No. 16,033

United States Court of Appeals
For the Ninth Circuit

TRADEWIND TRANSPORTATION COMPANY, LIMITED, (Formerly known as Allen Tours of Hawaii, Ltd.),
Appellant,

vs.

BERNICE (TERRY) TAYLOR,
Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLANT TRADEWIND TRANSPORTATION COMPANY, LIMITED.
(Formerly known as Allen Tours of Hawaii, Ltd.)

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JURISDICTION.

This action was commenced in the United States District Court for the District of Hawaii on December 18, 1956 (R. 65). The jurisdiction of the District Court was based upon §1332(a)(1) and §1322(b) of Title 28, U.S.C. As a result of the pretrial conference held on November 5, 1957, it was established that the appellee was a resident and citizen of the State of California, that the defendants were corporations

organized and existing under the laws of the Territory of Hawaii, and that the amount in controversy exceeded $3,000.00, exclusive of interest and costs (R. 13).

Judgment on the verdict of a jury was entered in favor of appellee and against appellant in the District Court on November 8, 1957 (R. 69). Appellant, on November 18, 1957, filed its written motion to set aside the verdict and judgment entered thereon and its alternative motion for a new trial (R. 44). Appellant's motions were denied by the District Court on March 6, 1958 (R. 55, 56).

Notice of appeal was filed in the District Court by appellant on March 12, 1958. The jurisdiction of this Court is founded on 28 U.S.C., §1291 and §1294(1).

STATEMENT OF FACTS.

Introduction.

This was an action brought by the appellee against the Soto Mission of Hawaii, Ltd. (hereinafter referred to as the "Mission"), appellant, and others to recover damages for personal injuries sustained on June 13, 1956, as a result of a fall on the front steps of the Soto Mission Temple, located at 1708 Nuuanu Avenue, Honolulu, Hawaii (R. 3). The steps whereon appellee fell are depicted in plaintiff's Exhibits 1 and 2 (R. 353 and 354). The action brought by appellee was, as the result of facts brought out at the pretrial conference, dismissed as against the defendants Leong Hop Loui and Bernice Char Loui (R. 73).

(a) Facts Agreed Upon at the Pretrial Conference.

As a result of the pretrial conference the following facts were agreed upon by the parties as being undisputed (R. 13 through 15); the appellee was a citizen of the State of California, and the Mission and appellant were Hawaiian corporations. The Mission was a non-profit, eleemosynary corporation. The appellant, whose name was changed from Allen Tours of Hawaii, Ltd. to Tradewind Transportation Company, Limited shortly prior to the date of the trial in the District Court, was engaged, among other activities, in the business of transporting tourists to various points of interest on the Island of Oahu, Territory of Hawaii.

On June 11, 1956, the appellee, as a member of a tour party conducted by Transocean Airlines, purchased from the appellant for the sum of $6.50 a ticket which entitled her to transportation on what is known as the Circle Island Tour. This consists of a trip around the Island of Oahu stopping at various points of interest on the way. At or about 8:30 a.m. on the morning of June 13, 1956, appellee, accompanied by three fellow members of the Transocean Airlines Tour party, entered an automobile owned by appellant and operated by one of its employees for the purpose of taking the aforementioned tour. At approximately 10:00 a.m. on the same morning, appellee was driven to the Soto Mission Temple at 1708 Nuuanu Avenue, Honolulu, Hawaii. The Temple and the premises upon which it is situated were owned by and were under the exclusive control of the Mission.

There was no contractual relationship between the appellant and the Mission. For several years members of the public have been allowed to enter the Temple and to observe the surroundings.

An accident occurred at the Temple on the morning of June 13, 1956, which resulted in personal injuries to the appellee. After the accident, appellee was taken to Queen's Hospital in Honolulu where she remained until she returned to California on June 27, 1956.

(b) Sequence of Events.

On the morning of June 13, 1956, after appellee and her three companions entered appellant's limousine, they were driven by Mr. Larry Pagay (who was as that time an employee of appellant) to the vicinity of the pier where the S.S. Lurline was to dock. They remained there for approximately half an hour and then proceeded back to the location where appellant's driver had told them to meet him (R. 84 and 117).

After the appellee and her companions had reentered the appellant's limousine they proceeded to the Temple on Nuuanu Avenue, which Temple is also referred to in the record as the Buddhist Temple. The driver of the limousine drove up to the front steps of the Temple and allowed appellee and her companions to alight for the purpose of viewing the interior of the Temple (R. 118). Prior to the time, and at the time the appellee arrived at the Temple, it had been raining on and off and the steps and walks at the Temple were wet (R. 118). Appellee observed the condition of the steps at the time she

entered the Temple and knew that they were wet (R. 119).

On the date in question appellee was wearing a pair of open leathersoled sandals (R. 86) which she had purchased a short time previously and had worn approximately six times prior to the date in question (R. 120).

After appellee and her companions had inspected the interior of the Temple, the tour driver met them at the entrance to the door of the Temple (R. 119). At the time the tour driver met appellee and her companions he gave each of them a hibiscus (R. 175). He noticed "a little tickle about it" and the party subsequently started to move down the stairs (R. 175). After appellee had passed over a series of steps to the interim landing she testified that she started down the main portion of the steps and slipped and fell on the second or third stair (R. 90).

It has not been alleged, nor does the record reveal, that any foreign substance was on the steps at the time of appellee's fall. Appellee's testimony is to the contrary (R. 91) as is that of the witness Pagay (R. 176). The parties agree that the steps were wet when appellee fell and that the moisture was caused by rain.

After appellee's injury Mr. Pagay carried appellee to appellant's limousine and took her directly to the Emergency Department of Queen's Hospital in Honolulu (R. 93-94). As a result of her fall appellee suffered injuries to her person.

(c) Evidence Concerning the Condition of the Steps at the Soto Mission Temple.

The Mission was designed in 1950 by Mr. Robert T. Katsuyoshi, a licensed architect, and his partner Mr. Fuchino, who is a structural engineer (R. 268). The building was completed in 1952 at which time the Temple and unglazed quarry tile steps were inspected and approved by Mr. Katsuyoshi (R. 268). Mr. Robert B. Ebert, a Territorial Safety Inspector, who was called as a witness by appellee, also inspected the building while it was under construction (R. 146). The record fails to indicate his approval or disapproval of either the structure or the red unglazed quarry tile steps at that time.

Mr. Katsuyoshi inspected the stairs prior to trial and testified that except for weather and wear, the steps were substantially the same as they were when first constructed (R. 269). Appellee does not allege that the steps were worn at the time of her fall and appellee's witness Ebert testified that the weathering of tile stairs tends to make them less slippery (R. 140).

Mr. Marcus C. Lester was called as a witness on behalf of the Mission (R. 269). Mr. Lester testified that he was licensed in 1924 under the laws of the Territory of Hawaii as an architect and that he had been practicing architecture since that time (R. 269-270). Mr. Lester was familiar with quarry tile and stated that it was very ordinarily used for heavy duty floors for both interior and exterior work (R. 272). He affirmed that the steps of the Temple, both as to

design and material, conformed to the standards and practice recognized in the Territory of Hawaii (R. 272). Lester stated that quarry tile was customarily used without handrails or abrasive stripping, and that it was customarily used in exterior work (R. 273). He stated that it was one of the safest materials to use (R. 281) and that the steps in question were constructed in an excellent manner (R. 271). As an example of this type of construction of exterior stairways, the witness cited the City Hall of the City and County of Honolulu (R. 272), Roosevelt High School (R. 274) and the Hawaiian Electric Building (R. 275).

Mr. Robert B. Ebert identified himself as a safety engineer in the employ of the Department of Labor, Territory of Hawaii (R. 125). The witness Ebert had no college degree in either engineering or architecture, nor had he ever been licensed as such under the laws of the Territory of Hawaii (R. 125, 128).

The Court, over objection, allowed Ebert to testify as an expert with reference to the qualities of tile and its relationship to safety (R. 135). The witness testified that quarry tile contributed to falls (R. 135 and 141). In his experience this type of floor caused accidents (R. 143). Later the Court allowed the witness Ebert to testify over objection as "an expert on safety" (R. 156).

The witness Ebert testified that prior to June 13, 1956, the Mission should have (1) applied abrasive stripping to the steps in question (R. 148); (2) installed handrails (R. 155); or (3) used anti-slip tile

(R. 151). The witness did not know whether anti-slip tile was available in the Territory of Hawaii at the time the Temple was constructed (R. 152). Ebert admitted that his opinions were based upon a high degree of professional standards of safety (R. 160) and admitted further that safety was a question of degree and that the corrections he suggested were to obtain the "optimum" degree of safety (R. 161). This witness, on cross-examination, admitted that in his opinion a reasonably prudent person, as opposed to a safety engineer, would not be aware of any safety hazard that was present at the Soto Mission Temple in June of 1956 (R. 156, 157).

As stated earlier, the evidence is undisputed that the steps in question were wet when the appellee entered the Temple and when she left. Aside from this undisputed evidence, the only other witness to testify regarding the condition of the steps was Mr. Larry Pagay.

Mr. Pagay identified himself as an employee of Gray Line of Hawaii (R. 168). On January 29, 1956, he entered the employment of appellant and was assigned to work as a taxi driver on the night shift. He continued this work for approximately two and one-half to three months after which he became a tour driver (R. 169). Pagay testified that prior to his employment with appellant, he had taken various people to the Temple on "many ocassions" (R. 181). He stated on cross-examination that, based upon his observation of the steps at the Temple, they were "less slippery than concrete steps" (R. 181) and

prior to the time of appellee's fall he had no experience of an unusual nature on the steps (R. 174).

On cross-examination by counsel for the Mission, this witness admitted that he had made a sworn statement prior to trial, one question of which read, "Have you ever had any knowledge of any member of your tour party or any other tour party falling on these steps?" Mr. Pagay's confirmed answer was, "not that I know of" (R. 186). During appellee's case in chief, Pagay testified that he had seen two or three people slip on the Temple steps prior to the date of appellee's fall (R. 171), but on cross-examination he qualified his prior testimony by stating that he had only seen one other person slip on the steps of the Temple. It was a driver whose identity was unknown to him (R. 177) since there were "hundreds" of drivers who go through the Temple (R. 170). This unidentified driver had not fallen (R. 185), and at the time of the incident Pagay was "very far from there" (the steps) (R. 171).

There is no evidence in the record to indicate whether at the time Pagay claimed to have seen the unidentified driver slip he was in the employ of appellant.

(d) The Contractual Relationship Between Appellant and Appellee.

The appellant on June 13, 1956, was engaged in the business of transporting passengers for hire to various points of interest on the Island of Oahu (R. 14). Normally, if a member of the public were to

purchase a ticket for the Circle Island Tour, he would be required to pay the sum of $9.90. Appellant had a special contract with Transocean Airlines whereby appellant agreed to carry members of the airlines' tour on the Circle Island Tour for the sum of $6.50 (R. 295). Under the terms of the contract between appellant and Transocean Airlines it was agreed that tour party members from Transocean Airlines would be furnished exclusive transportation, that is, members of the public would not be allowed to ride in vehicles which had been so assigned to the Transocean Airlines' customers (R. 295).

The appellee was a passenger of appellant under this special contract between appellant and Transocean Airlines. She purchased her ticket from the Transocean Airlines office for the sum of $6.50 and the companions who accompanied her on the tour were all members of her tour party.

The customary procedure on a tour of this type was for appellant's driver to deliver the passenger to the location where the point of interest existed. The passenger (appellee in this case) was then free to make any inspection of the premises that she desired (R. 117, 118).

There is no evidence that the driver of the vehicle actually conducted the tour party about the premises wherein the inspection was to be made. Appellee was aware of this procedure for her party had prior to going to the Temple been let off at the Matson piers in Honolulu so they could go to observe the docking of the S.S. Lurline (R. 84 and 117).

Appellee's party, when they arrived at the Soto Mission Temple, had been let out in front of the Temple and they were not escorted about the grounds by the tour driver (R. 118). It was customary practice for the drivers, after depositing their passengers, to stay with their limousines and await the return of the passengers who were free to wander about and inspect the Temple (R. 171).

(e) The Proceedings in the Lower Court.

The trial of this action commenced on November 6, 1957 (R. 77). At the close of the appellee's case in chief, counsel for appellant and the Mission moved for a directed verdict (R. 247). The Court reserved a ruling on these motions. After all parties had rested and prior to the case being submitted to the jury, the appellant made a request of the Court for a directed verdict on its behalf (R. 18). This request was denied by the Court and the case was submitted to the jury who, on November 8, 1957, returned a verdict in favor of appellee and against appellant in the amount of $14,545.00. At the same time the jury returned a separate verdict in favor of the Mission and against appellee. Separate judgments were entered on these verdicts (Docket entries, November 8, 1957) (R. 69).

Subsequently, and on November 18, 1957, appellant filed its motion for judgment and its alternative motion for new trial (R. 44). This motion was denied by the District Court on March 6, 1958.

QUESTIONS INVOLVED.

1. Did the District Court err in allowing Robert B. Ebert, appellee's witness, to testify over objection concerning his opinion as to whether the steps at the Temple were safe?

2. Was it error for the District Court to allow the witness Ebert to testify over objection that in his opinion the Mission should have installed certain safety devices on the Temple steps prior to June 13, 1956?

3. Was appellee's Exhibit No. 7 (a piece of abrasive stripping) properly admitted in evidence?

4. Did the District Court err in allowing the witness Ebert to qualify as an expert on safety and to state his opinions as to material and design of the Temple steps and the relation of the same to safety in view of the fact that by the witness' own testimony his opinions were based upon an optimum standard of safety and not upon a reasonable standard of care prevailing in the construction industry in the community?

5. Did the District Court abuse its discretion and commit prejudicial error in allowing counsel for appellee to attempt to impeach the architect, Mr. Lester, a witness for the Mission, by asking that witness whether he was aware of the fact that since the year 1947 the Safety Department of the Territorial Government had forbidden the use of quarry tile on exterior surfaces?

6. Did the District Court err in allowing counsel for the appellee to ask appellee's witness, Larry

Pagay, on redirect examination, his interpretation of what he meant in a prior sworn statement wherein he stated that he had never seen a member of a tour party slip on the Temple steps?

7. Did the District Court err in submitting to the jury the question of whether appellee's witness Pagay learned of the hazardous condition of the steps at the Temple prior to June 13, 1956?

8. Was there sufficient evidence upon which the jury could base a finding that the steps at the Soto Mission Temple on June 13, 1956, constituted a condition involving an unreasonable risk of harm?

9. Was there sufficient evidence to support a finding by the jury that appellant had notice of any hazardous condition which might have existed with respect to the steps of the Temple on June 13, 1956?

10. Was there sufficient evidence upon which the jury could base a finding that there had been a breach of any duty owing by appellant to appellee?

SPECIFICATIONS OF ERROR.

The District Court for the District of Hawaii is in error in this case in that:

1. The District Court erred in allowing appellee's witness Robert B. Ebert to state over objection his personal opinion concerning the safety of unglazed quarry tile stairs; such testimony was incompetent and constituted an invasion of the province of the jury.

"Q. Now, with reference to the tile that you observed last week at 1708 Nuuanu Avenue, what is your opinion from a safety standpoint as to that tile?

Mr. Fleming. I object, if Your Honor please. Again it is immaterial, incompetent and irrelevant. The question here is June 13, 1956, which is roughly a year and three months ago.

The Court. I will allow the witness to answer the question. I am certain that you will bring him back to such as that on cross-examination. And the jury will analyze the evidence accordingly.

A. In my opinion, and based on any number of observations with similar conditions, which have caused accidents, tile used in those stairs and the means used with no handrails, would contribute to an accident, could contribute to an accident." (R. 140-141).

2. The District Court erred in allowing Robert B. Ebert, an expert witness on behalf of appellee, over objection to state his opinion with reference to the substance of tile and its relationship to safety.

"Q. (By Mr. Ingman.) What are the qualities of quarry tile, if you know?

A. The qualities of quarry tile are such, being a hard surface tile, from the safety standpoint will contribute to slips and falls because of the very nature of the tile, particularly when it is wet.

Mr. Knight. I object, Your Honor, and ask that the testimony be stricken. This man is not an engineer. He is not [221] an architect. And he is unqualified to give a conclusion, an opinion as stated.

The Court. I take it, Mr. Ingman, that this testimony you are asking of the witness relates to his qualifications in the field of safety engineering?

Mr. Ingman. That's correct.

The Court. Not as to ceramics or structural engineering?

Mr. Ingman. That's correct.

Mr. Knight. We submit, Your Honor, that the witness is not competent to state an opinion as to material, designed material.

The Court. Well, I don't ask the questions. The question is whether on the basis of his qualifications, and his experience, he can state an opinion with reference to the substance and its relationship to safety. And for that reason I will overrule the objection.

Mr. Fleming. May it please the Court, may my objection also be noted for the record?

The Court. Yes. Would you read the question?"

(R. 135.)

3. The District Court erred in allowing Robert B. Ebert, a witness for appellee, to testify over objection as an expert on safety.

"Q. (By Mr. Ingman.) Now, Mr. Ebert, with regard to this condition which existed at 1708 Nuuanu in June of 1956, are there any other methods of safeguarding the premises, were there any other methods of safeguarding the premises in your opinion?

A. Yes, there were.

Q. Would you state the method or methods?

A. The accepted method would be the installation of a hand rail.

Mr. Knight. Objection, Your Honor, and I ask that it be stricken. The man is not an architect or engineer and those questions—he is not qualified to answer in that regard. The question asked calls for opinion from such an expert.

The Court. I will permit him to testify as an expert on safety, not architectural or on construction——

Mr. Knight. Your Honor, we have not yet had a definition of safety. What is safety?

The Court. The objection is overruled.

Mr. Fleming. May I for the record have the same objection?

The Court. Yes. Does that conclude your direct examination? [244]

Mr. Ingman. I was just going to ask him what type of railing he suggested for these specific premises.

The Court. Very well." (R. 155-156.)

4. The District Court erred when it allowed Mr. Robert B. Ebert, a witness for appellee, to give over objection his opinion concerning the overall design of the Temple steps and its relationship to safety.

"Q. Mr. Ebert, would you describe the exterior of the premises generally as they existed in June of 1956, beginning as you leave the outside door of the temple?

A. Well, as I remember, there is the same red quarry tile. Then there is an area with an abrasive-treated concrete section. Then it goes again to the stairway, made again of the red quarry tile.

Q. Is there anything objectionable in that from the safety standpoint?

A. Yes, there is.

Q. And would you state what that is, what the objectionable nature is?

A. The area that is treated with the abrasives constitutes a change in pace trip or fall hazard to a smoother surface.

Mr. Knight. Your Honor, I object. There is no evidence showing that this witness was aware or examined this section prior to June, 1956.

The Court. I thought his testimony was based on prior inspection. Is that correct?

The Witness. That's correct. [241]

Mr. Fleming. May it please the Court, I have an additional objection.

The Court. Yes.

Mr. Fleming. I believe the testimony has been from the plaintiff herself that she crossed this strip and that when she was on the second or third step she fell. So that based upon that, a general recitation of the various safety factors or lack thereof in the entire temple is not material to the issue of this case.

The Court. The objection overruled. It is time for our afternoon recess. Ladies and gentlemen of the jury, you will be excused for a ten-minute recess." (R. 152-153.)

5. The District Court erred in allowing Robert B. Ebert, appellee's witness, to testify from a safety standpoint about matters relating to quarry tile.

"Q. From a safety standpoint, what effect does the age of this type of tile have, what effect does the age of this type of tile have from a safety standpoint?

A. It depends on——

Mr. Knight. I object, Your Honor, to the question in that the witness has stated that he hasn't studied this kind of tile.

The Court. The objection is overruled.

Mr. Knight. To clarify it, that he is not competent to give the opinion asked on the basis of the record thus far.

Mr. Fleming. For the record I would like to——

The Court. Yes, as a matter of fact, I will consider that you are making the same objection, Mr. Fleming, to this line of evidence.

Mr. Ingman. Will you answer the question?

The Witness. I wonder if you would restate the question?

(The reporter read the question.)

A. It does one of two things, depending on the location of the tile, whether it is inside or outside, and the amount of wear and the amount of usage that it receives. It either becomes more slippery or becomes more abrasive, depending on where [227] it is, the conditions.

Q. Now, if the tile is outside unprotected from above, what effect does age have on the tile?

A. It could become less slippery, less slippery." (R. 139-140.)

6. The District Court erred in allowing Robert B. Ebert, a witness for the appellee, to testify over appellant's objection, that additional safeguards should have been installed on the Temple steps.

"Q. (By Mr. Ingman.) Now, Mr. Ebert, with regard to this condition which existed at 1708 Nuuanu in June of 1956, are there any other

methods of safeguarding the premises, were there any other methods of safeguarding the premises in your opinion?

A. Yes, there were.

Q. Would you state the method or methods?

A. The accepted method would be the installation of a hand rail.

Mr. Knight. Objection, Your Honor, and I ask that it be stricken. The man is not an architect or engineer and those questions—he is not qualified to answer in that regard. The question asked calls for opinion from such an expert.

The Court. I will permit him to testify as an expert on safety, not architectural or on construction——

Mr. Knight. Your Honor, we have not yet had a definition of safety. What is safety?

The Court. The objection is overruled.

Mr. Fleming. May I for the record have the same objection?

The Court. Yes. Does that conclude your direct examination? [244]

Mr. Ingman. I was just going to ask him what type of railing he suggested for these specific premises.

The Court. Very well." (R. 155-156.)

7. The District Court erred in admitting into evidence over appellant's objections a strip of adhesive abrasive as an additional safety factor which the Mission should have installed. (Plaintiff's Exhibit No. 7.)

"Mr. Ingman. Yes, Your Honor, I offer that in evidence.

The Court. Any objection?

Mr. Knight. Your Honor, my objection is to the whole line of questions, that the witness is not qualified to give an opinion.

The Court. The objection will be overruled. It will be received as exhibit number 7.

(The strip of abrasive referred to was received in evidence as Plaintiff's exhibit number 7.)

Mr. Fleming. With the same understanding?

The Court. Yes, Mr. Fleming." (R. 150.)

8. The District Court erred in allowing counsel for the appellee on cross-examination, over the objection of appellant, to ask Mr. Marcus C. Lester, a witness on behalf of defendant Mission whether he knew that since 1947 the Territorial Safety Department has forbidden the use of tile quarry in the construction of exterior steps.

"Q. Are you aware of the fact that since the year 1947 the Safety Department of the Territorial government has forbad the use of that type of quarry on the outside?

Mr. Knight. I object, your Honor, assuming a fact not in issue.

Mr. Ingman. I offer to prove this, your Honor.

Mr. Knight.—assuming a fact not in issue. The fact is that Mr. Ebert said he was present when the building [383] was being constructed up there and visited it several times since.

The Court. Well, I will allow the question.

Mr. Fleming. Your Honor, may I enter the same objection, that it is assuming a state of facts not in evidence.

Mr. Ingman. I offer to show that by Mr. Ebert.

The Court. What is that?

Mr. Ingman. I offer to show by the testimony of Mr. Ebert that that has been the situation since the year 1947.

The Court. I don't recall that.

Mr. Ingman. I don't say that he has testified to that. I have just talked to him at recess, Your Honor.

The Court. Let's not talk in the presence of the jury about any conversation you had.

Mr. Ingman. I offer in connection with the objection to show——

The Court. I said I would allow the question.

Q. (By Mr. Ingman.) Will you answer the question, please?

A. I have never heard of any such restriction." (R. 277-278.)

9. The District Court erred in allowing counsel for appellee over appellant's objection to ask the appellee's witness, Larry Pagay, the following question:

"Q. (By Mr. Ingman.) When you said that no member of a tour party fell, did you mean to include the driver of the car?

Mr. Fleming. Objected to, if it please the court, as leading and suggestive.

The Court. The objection is overruled.

Q. (By Mr. Ingman.) Do you understand the question?

A. Yes, I do.

Q. Will you answer it, please?

Mr. Fleming. May I have a further ground to the objection that it is calling for the conclusion of the witness.

The Court. Objection overruled.

The Witness. Well, did you say this right [284] now, that—if the man mentioned only the tour driver or my tour party?

Q. (By Mr. Ingman.) By the words 'tour party' did you mean to include the driver?

A. No, not the driver, sir." (R. 189-190.)

10. The District Court erred in refusing to give appellant's requested instruction No. 1, which charged the jury to return a verdict for appellant (R. 18).

"The Court. As I say, I will make a final ruling. Number 1 will be refused.

Mr. Fleming. I object to the refusal to grant Number 1, the Trade Winds, for the reason that there is no evidence to support a verdict against the defendant, Trade Winds. There is no evidence sufficient for the jury to find that a dangerous condition did in fact exist. There is no evidence upon which the jury could find that the defendant had notice, actual notice or constructive notice of any dangerous condition which was hidden. There is no evidence of any breach of duty on the part of the defendant Trade Winds. And, further, a further objection that the undisputed evidence is that there is a conflict in testimony—that there is one whom we concede to [421] be an expert, the architect, and the other who was offered as an expert as to the condition of those premises on the date in question and there is a conflict of experts themselves. As a matter of law, the defendant, Trade Winds, could not be chargeable with notice of any dangerous condition. There is complete lack of proof of any breach of duty by this defendant to the plaintiff." (R. 310.)

11. The District Court erred in its failure to submit appellant's instruction No. 12 as originally drafted (R. 24) save and except the amendment which substituted the phrase "unreasonable risk of harm" for the word "hazardous", and further erred over appellant's objection in submitting appellant's instruction No. 12 as modified to include the words "or its authorized employee" (R. 333).

> "Mr. Fleming. Well, I will submit it as it is amended up to this point, your Honor.
>
> The Court. Well, I will make the amendment myself by inserting after 'Limited', 'or its authorized employee'. [432]
>
> Mr. Fleming. May I for the record object to any amendment to the instruction as originally given save and except the amendment relating to hazardous condition, and object to the amendment and failure to give the amendment with the above amendment 'or its authorized employee' for the reason that there is no evidence as to the authority of the one employee of whom you speak. I assume it being Mr. Pagay.
>
> The Court. Very well. The exception is noted." (R. 320.)

Appellant's instruction No. 12, as given over objection by appellant, charged the jury to find for the appellee if the steps created an unreasonable risk of harm and if the appellant "or its authorized employee" had actual knowledge of the defect (R. 333).

12. The District Court erred in giving appellee's requested instruction No. 10 (R. 39) over appellant's objection.

Appellee's instruction number 10 charged the jury to find for appellee irrespective of what they might find as to defendant Mission if appellant's employee had learned of the condition in the scope of his employment prior to June 13, 1946 (R. 332). This instruction was given partially over appellant's objection.

> "Mr. Fleming. I will object to Number 10 on the grounds that there isn't any evidence at all in the record to support the proposition in so far as it has to do with the tour company. There is an entire failure of proof on the part of the plaintiff to show such on the part of the tour company. There isn't any evidence to show that anyone learned of any dangerous condition during the course of their employment. The record is absolutely blank on that particular thing. And I might say there that Pagay admitted on cross examination that the steps were good, that they were less slippery than ordinary steps. That is verbatim." (R. 305.)

13. The District Court erred when, after reserving its ruling on appellant's motions for a directed verdict at the close of appellee's case (R. 251), and at the close of the evidence (R. 296 through 300), and refusing to give (R. 310) appellant's requested instruction No. 1 requesting a directed verdict in favor of appellant (R. 18), it denied appellant's motion for a judgment notwithstanding the verdict to the contrary (R. 55).

Appellant's said motion for a judgment notwithstanding the verdict to the contrary was based on the

fact that there was not as a matter of law sufficient competent evidence to support or warrant a finding by the jury that the steps at the Soto Mission Temple on June 13, 1956, involved an unreasonable risk to the person of the appellee, that there was not sufficient competent evidence from which the jury could find that the appellant had notice of any such condition involving unreasonable risk to the person of the appellee, that there was not sufficient competent evidence to support the finding of the jury that there had been a breach of any duty owing by appellant to appellee and that the evidence adduced in the District Court with all inferences that could be reasonably and justifiably drawn from it, was not sufficient to provide a basis upon which a verdict could be rendered in favor of appellee against appellant (R. 44).

14. The District Court erred when after denying appellant's motion for a judgment notwithstanding the verdict to the contrary, it denied appellant's alternative motion for a new trial (R. 55), in that the verdict was contrary to law, and contrary to the evidence and the weight of the evidence, and that the appellant was entitled to a new trial pursuant to its motion (R. 46), by reason of errors committed by the District Court as more specifically set forth in appellant's specifications of error set forth in this brief.

SUMMARY OF ARGUMENT.

I.

The District Court erred and abused its discretion by allowing Robert B. Ebert, a safety engineer, to testify as to his opinion on safety since this was an ultimate question of fact reserved for the jury and such testimony insofar as material invaded the province of the jury.

II.

In the absence of evidence of local custom and usage, it was prejudicial error for the District Court to admit over objections evidence as to safety devices which allegedly the defendant Mission should have incorporated into its Temple steps.

III.

The District Court committed prejudicial error in allowing improper examination by counsel for appellee of the witnesses Pagay and Lester.

IV.

There was no competent evidence upon which the jury could predicate a finding that the condition of the steps at the Soto Mission Temple on June 13, 1956, constituted an unreasonable risk of harm to the person of appellee.

V.

As a matter of law there was not sufficient evidence of the breach of any duty owing by appellant to appellee.

ARGUMENT.

I.

IT WAS PREJUDICIAL ERROR FOR THE COURT TO ALLOW APPELLEE'S WITNESS ROBERT B. EBERT TO TESTIFY AS TO HIS OPINION CONCERNING SAFETY. SUCH TESTIMONY WAS INCOMPETENT AND ITS RECEPTION CONSTITUTED AN INVASION OF THE PROVINCE OF THE JURY.

This argument concerns appellant's specifications of errors Nos. 1 through 6, which deal generally with the opinion testimony of the safety engineer Ebert.

Appellant recognizes that a trial court has discretion as to who may qualify as an expert. Appellant concedes that it was within the discretion of the District Court to allow the witness to testify as to the qualities of unglazed quarry tile if on the basis of his previous testimony the Court felt him qualified to do so. Over objection the District Court allowed Mr. Ebert to testify not only as to the qualities of quarry tile but its relationship to safety (R. 135). Later the Court refused to allow the witness to give his opinion as to architectural or engineering matters but did allow him over objection to testify generally as an expert on safety (R. 156, Specifications of Error No. 6, this brief), even though there had been no definition of the term "safety" (R. 156).

Mr. Ebert's testimony is summarized in the statement of facts at page 7 of this brief. In addition to the testimony there set forth, Ebert was allowed to give his opinion that this type of tile caused accidents (R. 143), that a slip fall was due to this type of flooring (R. 144), and that any stairway built of quarry tile must have anti-slip treatment (R. 148).

One of the questions for the jury to decide in this case was whether the steps at the Temple were so constructed or maintained as to create a condition resulting in an unreasonable risk of harm, that is, were the steps negligently constructed or maintained? The testimony of Mr. Ebert as to what in his opinion should be done to safeguard the steps concerned the very question which the jury was called upon to decide. A parallel might be drawn in a case involving personal injuries arising out of an automobile accident where a police officer with wide experience in traffic matters would be called as a witness to give his opinion as to whether an individual driver involved in the accident acted with or without due care. Clearly, such testimony would be incompetent.

In *Nelson v. Brames,* 241 F.2d 256 (10 Cir. 1957), an expert who was a consulting engineer and professor was allowed by the trial court to testify that in his opinion the use of chains on automobile tires under the circumstances shown in the case was not advisable. In holding such testimony to be improper the appellate court stated:

> ". . . It is the general rule that expert testimony is appropriate when the subject of inquiry is one which jurors of normal experience and qualifications as laymen would not be able to decide on a solid basis without the technical assistance of one having unusual knowledge of the subject by reason of skill, experience, or education in the particular field; that the admission or rejection of expert testimony rests largely in the sound judicial discretion of the trial court; and that when exercised within normal limits,

such discretion will not be disturbed on appeal. Francis v. Southern Pacific Co., 10 Cir., 162 F.2d 813, affirmed, 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798; E. L. Farmer & Co. v. Hooks, 10 Cir., 239 F.2d 547. But the testimony that the use of chains was not advisable went beyond the range of that general rule. The effect of the testimony was to express the opinion that under all of the circumstances shown in the case an ordinarily careful and prudent operator of an automobile would have driven his car without chains. The effect of it was to express the opinion that under all of the circumstances shown, the operation of the automobile of defendants without chains did not constitute negligence. It was an expression of opinion upon a pivotal issue of fact for the jury. It amounted to a usurpation of the function of the jury. And its admission constituted error. Gordon v. Robinson, 3 Cir., 210 F.2d 192; Pointer v. Klamath Falls Land & Transportation Co., 59 Or. 438, 117 P. 605; Lehman v. Knott, 100 Or. 59, 196 P. 476; Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35; Buehman v. Smelker, 50 Ariz. 18, 68 P.2d 946; Weng v. Schleiger, 130 Colo. 90, 273 P.2d 356; Wawryszyn v. Illinois Central Railroad Co., 10 Ill.App.2d 394, 135 N.E.2d 154; Cone v. Davis, 66 Ga.App. 229, 17 S.E.2d 849."

Lavoie v. Brockelman Bros., 315 Mass. 673, 53 N.E. 2d 999, 1000 (1944):

"There was no error in excluding the testimony of a witness whose business was the designing and equipping of stores, and who was offered as an expert, that the method of constructing the booth would create 'hazards to customers' and

> that this type of cashier's booth is not safe 'from the customer's point of view.' The plaintiff had already been allowed to show all the characteristics of the booth and counter which she contended were defects. Whether these were hazardous to customers or unsafe from their point of view necessarily depended, in the circumstances of this case, upon where the customers had been invited to go. That was a question for the jury and not for the witness. Moreover, the conditions shown were such as to be easily comprehended by the jury, and it is difficult to see any necessity for the testimony of an expert. . . ." (Citations omitted.)

The following cases at the page noted support the aforementioned rule of law:

Morton's Adm'r. v. Kentucky-Tennessee Light & P. Co., 282 Ky. 174, 138 S.W.2d 345, 347-8 (1940);

Blinkinsop v. Weber, 85 Cal.App.2d 276, 193 P.2d 96, 99 (1948).

While appellant concedes that this Court is not bound by decisions of inferior Federal Courts, nevertheless, it is of interest to note the decision in the United States District Court for the District of Hawaii, made by the Honorable J. Frank McLaughlin on July 25, 1958, in the case of Paula C. Fraser and Robert A. Fraser, Plaintiffs, vs. Matson Navigation Company, a California Corporation, Defendant, the same being noted in the records and files of the Court as Civil No. 1535. A copy of the entire oral decision which was reduced to writing and the original tran-

script of which by the Rules of the Court was filed with the Clerk of the Court on August 1, 1958, is found in Appendix I of this brief.

This was an action brought by husband and wife against the the defendant for injuries suffered by the wife as a result of falling on the steps of the Royal Hawaiian Hotel in Honolulu. In setting aside the verdict in favor of the plaintiff and entering a judgment for the defendant, the District Court recognized its error in allowing Mr. Robert B. Ebert to testify as an expert with regard to the safety of the steps in question.

It is submitted that prejudicial error was committed by the lower Court in allowing Robert B. Ebert to testify as an expert on safety. The effect of condoning such a practice would be to open the doors wide to a flood of incompetent opinion evidence.

II.

IN THE ABSENCE OF EVIDENCE OF STANDARDS OF THE COMMUNITY, EVIDENCE IN THE FORM OF OPINION EVIDENCE AS TO WHAT ADDITIONAL PRECAUTIONS SHOULD HAVE BEEN PLACED ON THE STEPS IN THE TEMPLE WAS INADMISSIBLE.

This argument concerns appellant's specifications of error numbers 4, 6 and 7 supra.

The standard of care owed by the owner of a building to third parties is that of the responsible property owner under like circumstances. In *De-*

Weese v. J. C. Penney Co., 5 Utah 2d 116, 297 P.2d 898 (1956), the defendant store was held liable to one injured by a fall upon evidence that the store knew that terrazzo became slippery when wet and that it was defendant's custom and the custom of other stores to use rubber entrance mats in inclement weather, which in this case defendant had neglected to do. Id. p. 901. In so deciding the case, the court noted and distinguished the aforementioned and recognized standard of care.

> ". . . Testimony as to the customs and practices of others similarly situated was admitted as bearing upon the issue of what ordinary and reasonable care under the circumstances was. Such was the only duty of care submitted to the jury as reflected in Instruction No. 10, wherein the court correctly charged that it was the defendant's duty, '* * * to exercise reasonable care to keep the entranceway to [its] store reasonably safe for the use of its customers.' "
>
> ". . .
>
> "The principal attack made upon the judgment relates to errors assigned in admitting certain testimony which defendant characterizes as 'an attempt by plaintiff to set up the purported actions and customs of W. T. Grant's store as a standard for defendant to meet.' There can be no doubt that it would not have been proper to use the procedure of any particular individual, or of the W. T. Grant Co. store, either generally, or in connection with this particular storm, as a standard of care upon which to determine whether the Penney Company was negligent. . . ." Id. 899.

The only evidence in the record as to the practice and customs prevailing in the community is that of the architect, Mr. Lester, who testified that the Mission steps both as to design and material conform to the standards of the Territory (R. 272).

Appellee's witness, Mr. Robert B. Ebert, testified over objections that the Mission should have applied an abrasive stripping (R. 148), or employed handrails (R. 155), and/or constructed the stairs with an anti-slip tile (R. 151) although he testified that he did not know when this type of tile became available in the Territory (R. 152).

Mr. Ebert did not purport to testify on the basis of standards of custom and usage prevailing in the community as established by other property owners; in fact, it later developed on cross-examination that the safety engineer admitted that the standards to which he testified were a high degree of professional standards for safety (R. 160), and that his testimony was predicated upon securing optimum safety (R. 161).

Where, as in this case a standard of safety is not properly defined (R. 156), the testimony of a safety expert is inadmissible.

> ". . . An expert cannot be permitted to testify whether or not a certain practice is a 'safe one,' though he may, if properly qualified, testify whether or not the *common usage* of a business had been adhered to by the defendant. 'The test of negligence is the ordinary usage of the business.' Ford v. Anderson, 139 Pa. 261, 21 A. 18, unless, as stated above, a custom is so *obvi-*

> *ously dangerous* as to be easily recognizable as such. *An act cannot be branded as negligence because some expert or alleged expert characterizes it as an unsafe practice.*" (Italics added.)
>
> *Sweeney v. Blue Anchor Beverage Co.,* 325 Pa. 216, 189 Atl. 331, 335 (1937).

In *Blinkinsop v. Weber,* 85 Cal.App.2d 276, 193 P.2d 96 (1948), plaintiff, an employee manager of defendant's apartment building, sought recovery for personal injuries resulting from a fall on the steps of the apartment. In affirming a judgment for defendant, the court noted the standard of care upon which a breach of duty might be predicated.

> ". . . The opinion of the witness as to whether the steps were built in accordance with standard and accepted construction and architectural practice should have been received. His opinion thereon might have been of some assistance in determining whether the defendants were negligent in maintaining the steps. . . ." (193 P.2d 96, 100).

In the same case the appellate court very carefully upheld the lower court's rejection of safety opinions about the steps in question.

> ". . . It was not error to reject the opinion of the witness as to whether the steps were safe. 'Usually an expert cannot be asked whether a structure is a safe one, but all of the facts may be elicited from the witness from which the conclusion follows.' " (193 P.2d 96, 100).

In view of the fact that there was no evidence that the Mission did not adhere to the standards of due

care under the circumstances, evidence as to what safeguards the Mission should have installed for optimum safety had no bearing on the question of negligence.

III.

THE COURT ERRONEOUSLY ALLOWED OBJECTIONABLE AND PREJUDICIAL QUESTIONS TO BE ASKED BY COUNSEL FOR THE APPELLEE OF THE WITNESSES LESTER AND PAGAY.

A. It Was Improper to Allow Counsel for the Appellee to Question the Architect Mr. Lester on Cross-Examination Based on an Assumption of Facts Totally Unsupported by the Record (Appellant's Specifications of Error No. 8).

Over objection, counsel for the appellee was allowed on cross-examination to ask the witness the following question: "Are you aware of the fact that since 1947 the Safety Department of the Territorial Government has forbade the use of that type of quarry on the outside?" (R. 277).

At that point (and at the present), the record was devoid of any evidence that the Safety Department had made or had authority to make any such ruling.

Mr. Ebert, the safety engineer, had attempted to make many refernces to the laws of the Territory as regards safety (R. 142, 143, 149 and 152). The Court had admonished the witness Ebert that he was not to testify as to the law (R. 143). When this witness testified that abrasive stripping was required by law on quarry tile steps, such testimony was stricken by the Court (R. 149). The only applicable evidence of any rule or regulation of the Territory of Hawaii dealing with the subject matter is found in the testi-

mony of Mr. Ebert wherein he stated that the use of quarry tile was prohibited for use around machinery due to the oil making it slippery or dangerous (R. 152).

It is elementary that it is improper to ask a witness, whether on direct or cross-examination, a question which assumed a state of facts not in evidence. 3 *Jones on Evidence* (4th ed. 1938) §843, p. 1559 and cases cited in fn. 6. In this instance, after objection had been raised to the question, counsel for appellee advised the Court in the presence of the jury, that the basis of the question was a conversation that counsel had had with Mr. Ebert, the safety engineer, during a recess (R. 278). Thereafter, the witness Lester was allowed to answer the question and stated that he never heard of any such restriction (R. 278).

Subsequent to appellee's offer of proof a motion was made to strike the question and the answer (R. 292). At the commencement of trial the following day counsel for appellee stated that the question had been predicated upon rulings made under Act 64, Session Laws of Hawaii 1947 (Chapter 96, Revised Laws of Hawaii 1955). The Act in question, with the omission of the sections dealing with definitions and the sections dealing with injections and penalties, is set out verbatim in Appendix II of this brief. An examination of this law will clearly indicate that it was inapplicable as a basis for making the assumption of facts posing the question. The Court recognized this proposition and granted the motion to strike both the question and the answer (R. 292).

Admittedly, the question and answer were stricken on the following day of the trial, and the jury was instructed to disregard them. It is usually presumed that a jury will follow the Court's instructions. However, in this case the question asked of the witness was so clearly erroneous that the objection to it should have been sustained immediately. The effect of the failure of the Court to sustain the objection led directly to the events which followed, to-wit: A statement by counsel for appellee concerning the subject matter of an interview with the safety engineer during the recess (R. 278). The subject matter of this conversation between counsel and the safety engineer who had previously testified could not be erased from the minds of the jury by an instruction given on the following day to disregard the question and answer (R. 292).

B. The District Court Abused Its Discretion in Allowing the Witness Pagay to Testify on Redirect Examination as to His Interpretation of a Prior Sworn Statement (Appellant's Specifications of Error No. 9).

The witness Pagay was called as appellee's witness (R. 168). He was not a hostile witness towards appellee. On the contrary, the record indicates that he was friendly (R. 188). On direct examination, this witness acknowledged that he had made a prior sworn statement wherein he had stated that he had no knowledge of any member of his tour party or any other party falling on the steps (R. 186).

On redirect examination (R. 189, 190), the witness was asked whether when he made such statment he

meant to include a driver of the car. The question was objected to both from the grounds as to form, i.e. leading, and that it called for a conclusion of the witness. The objection was overruled and, as could be expected, the witness said that he did not intend to include the driver (R. 189, 190). Appellant recognizes that the propriety of interrogating a witness by means of leading questions is primarily one within the discretion of the trial Court and will not be subject to review unless an abuse of discretion is established. 3 *Jones on Evidence* (4th Ed. 1938) §819. Of course, it is difficult to determine what an abuse of discretion is in any given case as each depends upon its own peculiar facts.

Appellant submits that the situation which existed prior to the posing of this question to the witness presented the jury with the question of the credibility of a material witness. By allowing the question to be asked in this manner a conclusion was drawn which in effect usurped the province of the triers of fact. It is respectfully submitted that the lower Court under these circumstances exceeded the bounds of its discretion.

IV.

THERE WAS NO EVIDENCE THAT THE SOTO TEMPLE STEPS PRESENTED AN UNREASONABLE RISK OF HARM TO PLAINTIFF.

This argument concerns appellant's specifications of error numbers 10 and 13.

A. The Fact That Appellee Fell on the Temple Steps Creates No Presumption in Her Favor.

Unfortunately, as is so often the case, there are no Hawaiian "slip and fall" cases in point. Cases from other jurisdictions are so numerous that it would serve no useful purpose to attempt to digest them in this brief.

It has long been recognized that a mere slip or fall raises no presumption of negligence and is not evidence by which negligence may be assumed. An examination of these decisions, most of which involve invitees, reveals that the authorities have laid down certain general rules of law applicable to this type of case. It is established by the great weight of authority that the fact that a person falls on steps is not evidence of any negligence on the part of the person in control of the steps.

> "The fact that invitee may have slipped on the floor of the store did not shift to defendant burden of establishing that acident did not occur through its negligence, nor create presumption of negligence. The presumption is that defendant exercised reasonable care, as respects liability for injury to plaintiff on account of slipping on floor. Defendant was not an insurer against accidents to persons entering the store for making purchases or otherwise on invitation.
>
> "Unless plaintiff introduced sufficient evidence to make an issue that plaintiff slipped on the floor through negligence of defendant's employees, or because of condition of which defendant had actual or constructive notice, in time to remove the cause by mopping or by other means

> which was its duty to reasonably do, recovery cannot be here affirmed." *Sears, Roebuck & Co. v. Johnson,* 91 F. 2d 332, 338 (10 Cir. 1938).

In accord, *Wilkins v. Allied Stores of Missouri,* (Mo. 308 S.W. 2d 623, 629, (1958); *Copelan v. Stanley Co. of America,* 142 Pa. Super. 277, 17 A. 2d 659, 660 (1941). *Gaddis v. Ladies Literary Club,* 4 Utah 2d 121, 288 P. 2d 785, 786 (1955) and *De Baca v. Kahn,* 49 N.M. 225, 161 P. 2d 630, 635 (1945).

The reason for this rule is best summed up by the following holding in *Knopp v. Kemp & Hebert,* 193 Wash. 160, 74 P. 2d 924, 926 (1938):

> "Walking, although it becomes automatic by long practice and use, is, after all, a highly complicated process. The body balance is maintained by the co-ordination of many muscles, and their operation is controlled by an intricate system of motor nerves, the failure of any of which for a split second, on account of advancing age or for some other reason, may cause a fall. It is common knowledge that people fall on the best of sidewalks and floors. A fall, therefore, does not, of itself, tend to prove that the surface over which one is walking is dangerously unfit for the purpose."

(This case involved a slip fall on a wet terrazzo arcade.)

B. There Was No Competent Evidence of Either Improper Construction or Improper Maintenance With Regard to the Steps at the Temple.

In 1952 the Soto Mission Temple was designed and built under the direction of an architect and a struc-

tural engineer (R. 268). The building was inspected during construction by Mr. Robert B. Ebert, a safety engineer in the employ of the Territory of Hawaii (R. 146).

They were four witnesses who testified as to the condition of the Temple steps.

The appellee testified that she observed the condition of the steps when she entered the Temple and they were wet (R. 119). When identifying plaintiff's Exhibit 2 (a photograph of the Temple steps) appellee noted that the photograph contained something dark on the steps in question and testified that she did not remember this to be present on the steps at the time of her fall (R. 91).

Mr. Pagay, appellant's tour driver, testified that the stairs were less slippery than ordinary concrete steps (R. 181), and that there was no foreign substance other than rain on the steps (R. 176). When asked whether he had any experiences of an unusual nature on these steps prior to appellee's fall he stated that he did not (R. 174).

Mr. Lester, an architect, testified that the steps of the Soto Temple were constructed in an excellent manner (R. 271) and that the steps both as to material and design conformed to the established standards and practice of the Territory (R. 272). He further testified that wet unglazed quarry tile is no more slippery than cement on a sidewalk (R. 280) and that this type of tile is ordinarily used for heavy duty exterior work for both flooring and stairs (R. 273). Mr. Lester also stated that unglazed quarry tile is

customarily used without handrails or abrasive stripping (R. 273).

Mr. Ebert's testimony was to the effect that unglazed quarry tile should not be used in the absence of abrasive stripping (R. 148), or handrails (R. 155) unless the tile is of an anti-slip nature (R. 151). This witness did not know whether the latter was available in the Territory in 1952 when the Temple was constructed (R. 152).

Mr. Ebert was the only witness whose testimony might have given rise to an inference that there was anything wrong with the Temple steps. His testimony, even if it had been competent, was immaterial and formed no basis for a finding of negligence since, admittedly, the standards to which Mr. Ebert testified were those of a high or optimum professional standard of safety (R. 160-161) and not those of a reasonable man under the circumstances.

In order for appellee to prevail she must prove a distinct and tangible defect in the steps of the Temple and this she has failed to do. Note the holding in *J. C. Penney Co. v. Robison,* (28 Ohio St. 626, 193 N.E. 401, 404 (1934)) were a "slip-fall" verdict in favor of plaintiff was properly reversed.

> "The case of Gibbs v. Village of Girard, 88 Ohio St. 34, 102 N.E. 299, largely relied upon by defendant in error, is not in point here, as there was in that case a specific definite defect, to wit, a two-inch offset in the sidewalk, shown by the testimony to exist. A distinct tangible defect was shown to exist in that case, while in the case

before us pure speculation must be indulged as to just what caused Mrs. Robison to slip.

"We agree that the right of trial by jury is guaranteed to all citizens by the Constitution of Ohio, and it cannot be invaded or violated by legislative act or judicial decree; but all this does not mean that all cases, regardless of evidentiary aspect, must be submitted to a jury. Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right."

See also *Gaddis v. Ladies Literary Club,* 4 Utah 2d 121, 288 P. 2d 785, 786 (1955) and *Sears-Roebuck & Co. v. Johnson,* 91 P. 2d 332, 338 (1937).

Appellant's position can best be summed up by an excerpt from Shearman and Redfield on Negligence, (Revised ed. 1941) §797, page 1820:

"It is not uncommon for a person to fall down stairs when there is no defect in the stairway or its covering. A heel may catch on the edge of the stair, or the carpet, and a fall results. The fault rests, not with the stairway, but with the person who so placed his foot. Too often, the accident having so happened, such a person seeks a 'defect' through which to pin upon another the damage flowing from his own lapse. The frequency of that situation led one justice, during argument of an appeal, to make the ironic comment that 'They always find it.' "

V.

THERE WAS NO EVIDENCE UPON WHICH A FINDING COULD BE PREDICATED THAT THE APPELLANT BREACHED ANY DUTY TO THE APPELLEE (Assignments of Error 10 through 14).

A. Assuming That the Condition of the Temple Steps Was Hazardous, Still There Was a Complete Failure of Proof With Regard to Notice of Such Condition by the Appellant.

Appellee has proceeded against appellant upon the theory that its driver, Mr. Pagay, had notice of a hazardous condition prior to June 13, 1956. Counsel for the appellee conceded that unless Mr. Pagay had such notice and that such notice was imputable, appellee's case against appellant must fail:

> "The Court. What do you have to say, Mr. Ingman, as to the motion on behalf of the defendant Trade-Winds?
>
> Mr. Ingman. The plaintiff's case as to the defendant Trade-Winds stands or falls in my opinion on whether the notice and whether the knowledge of the driver of the cab—the notice thereby given him of the dangerous condition is notice which is binding upon the defendant corporation. I think that as far as Mr. Fleming's motion, it boils down to that one point. I would like an opportunity to submit further authorities on that point before the Court rules on it.
>
> The Court. That was the evidence of the witness Pagay, that he saw someone slip on these steps prior to June 13, 1956, and fall?
>
> Mr. Ingman. Yes. I think that if the Court holds that that was not sufficient notice, that notice to the driver of the tour car is not sufficient notice to the defendant corporation, then our case must fall. I believe that is sufficient notice." (R. 250).

The answer to the question of whether the driver Pagay had notice requires a careful analysis of Pagay's testimony.

In this connection there are three questions which must be answered:

1. Did Pagay himself have notice?

2. If the driver had notice, what was it notice of?

3. Is there any evidence that such notice obtained by Pagay would be imputed to the appellant?

Mr. Pagay testified that he was hired as a taxi driver by appellant on January 29, 1956 (R. 168) and worked for about two and a half or three months as a taxi driver on the night shift before being moved to the day shift as a tour driver (R. 169). Testimony indicates that prior to the time Larry Pagay was employed by appellant, he had on many occasions taken various people to view the Temple (R. 181). Under the evidence most favorable to appellee, Larry Pagay could have been employed by appellant as a circle island tour driver for a period of only two months prior to June 13, 1956. There is no evidence to show that he was employed by appellant on the one occasion on which he testified he saw a taxi driver slip on the Temple steps (R. 177 and 170).

Pagay testified that prior to his employment with appellant he had taken various people to the Temple on many occasions (R. 181). He admitted on cross-examination that based upon his observation of the steps of the Temple, they were less slippery than

ordinary concrete steps (R. 181) and that prior to the time of appellee's fall he had no experience of any unusual nature with the steps (R. 174). He was not aware of any danger with regard to these steps until after June 13, 1956 (R. 181). At the time Pagay stated that he saw an unidentified taxi driver slip, he was far from the secne (R. 171), and he had no opportunity to determine the cause or observe the details of the incident (R. 178).

Based upon this testimony, it is reasonable to presume that at some time, which could have been prior to Pagay's employment, he had from a great distance seen someone slip on the Temple steps out of hundreds of drivers (and presumably many hundreds of guests) who drove through the Temple (R. 170). The answer to question number one then, there is evidence in the record that Pagay saw one person slip at some undetermined date prior to June 13, 1956. The mere fact that someone slipped on steps creates no presumption of any defect. *Sears, Roebuck & Co. v. Johnson,* supra.

In answer to the second question, it is conceded that at some time Mr. Pagay gained knowledge that one person at some time in the past had slipped but the cause thereof was unknown to him. The appellee's witness, the safety engineer, testified that the condition of the Temple steps was not such that an ordinary, reasonable person would be aware of any safety hazard (R. 156, 157). As stated above, the tour driver had ample personal experience with the steps to lead him to believe that they were in all respects adequate.

There are no facts in the record to support a finding that appellant knew that once upon a time an unidentified driver had slipped on the steps. In order that the knowledge of the driver be imputed to appellant, it would be necessary for the driver to have gained such knowledge while acting within the scope and course of his employment and under circumstances requiring him to communicate such knowledge to his employer.

F. W. Woolworth Co. v. Carriker, 107 F. 2d 689 (8 Cir., 1939) was an action brought by a person who slipped in the defendant's bakery. The fall was caused by slush and dirt on the floor of the bakery. A judgment on the verdict was entered in favor of the plaintiff, and the defendant appealed. The appellate court reversed and remanded the case to the lower court.

One of the questions presented was whether defendant had notice of the defect. The only evidence as to actual notice to the landowner was that one Hipp, a baker employed by the defendant, testified that he had slipped on the same spot while going to work approximately two hours and a half before the plaintiff fell. The Circuit Court held that this testimony was insufficient to prove notice on the part of the defendant.

> "The evidence reveals no actual knowledge of this condition by anyone connected with defendant except Edwin Hipp. He was a baker who was employed as such in the basement where this accident occurred. He obtained his knowledge when he slipped at the same spot while

> going to his place of work about five minutes before four A.M.—approximately two and one-half hours before this accident. There is no direct evidence that Hipp had any duties concerning the care of this aisle nor are such duties to be inferred from the character of his employment as a baker in another part of the basement. McKeighan v. Kline's, Inc., 339 Mo. 523, 530, 98 S.W.2d 555, 559. The evidence as to actual knowledge was insufficient." Id. 693.

Appellee failed to prove that Pagay was in the employ of appellant at the time of the incident, or that there was any duty on his part to report such incident to his employer. If a member of the driver's tour party had fallen then, perhaps, there would be a reasonable inference that he would be required to report to his employer and the employer would be charged with notice thereof.

> "In order that an agent's knowledge may be imputed to his principal, it must have been received during the existence of the relationship, or, at least, if obtained prior to that time, it must have been present in the agent's mind during the transaction in question." (3 C.J.S. Agency, §274, p. 206).

If the Temple steps constituted a hazardous condition, Pagay did not know about it or realize it until after the incident of June 13, 1956 (R. 18).

B. In the Absence of Contract Appellant Owed no Duty to Appellee for Injuries Sustained on Property Which Is Open to the Public and Owned and Controlled by Third Parties (Specifications of Error Nos. 10, 13, 14).

Where appellee's tour party has left the control or direction of appellant's tour driver, what duty is owed by appellant to appellee for injuries sustained upon premises which are owned and controlled by third parties and open to the public?

This case presents an unusual and somewhat unique duty relationship between the appellant tour company and its appellee passenger. Appellee purchased a Circle Island Tour ticket at a reduced rate in order to witness various tourist attractions on the Island of Oahu (R. 14). The ticket entitled appellee to transportation to and from these points of interest but did not include a guided tour through premises which are open to the public and which are owned and controlled by third parties. The customary procedure is that appellant's driver deliver the passengers to the location of interest at which time the passengers are free to make any inspection of the premises that they might desire (R. 117, 118). Eventually the tour passengers reassemble for pickup at a pre-arranged time and are transported to the next object of interest. The parties had conformed to this practice while observing the docking of the S.S. Lurline in Honolulu Harbor (R. 84 and 117) prior to visiting the Temple, and had followed this practice at the Temple (R. 118). It is customary for appellant's tour drivers to remain with their vehicles at the Temple (R. 171).

Except for common carrier cases, where the carrier either owns or controls the premises involved, or has a contractual interest in same, there are no cases which impose such a duty upon a contract carrier in the absence of active negligence. Dicta to the contrary are found in *Pierce v. Burlington Transp. Co.,* 139 Neb. 439, 297 N.W. 656 (1941) where plaintiff suffered injuries in defendant's hotel Ladies Room, while making a rest stop enroute on defendant's bus. Following *Pickwick Stage Lines v. Edwards,* 64 F. 2d 758 (10th Cir. 1933), which has similar dicta, the Nebraska Supreme Court in the *Pierce* case made the following statement at page 658:

> "The Burlington Transportation Company contends that there was no negligence shown and, even if there was, that the facts are not sufficient to charge it with responsibility. The record is entirely devoid of evidence that this defendant owed any duty to the plaintiff with respect to the care of the rest room. The space occupied by the Burlington Transportation Company was rented direct from the Neville Company. The business of the Jensen Hotel Company and of the bus company were separate and distinct, the evidence affirmatively showing that no agreement, business relation or arrangement, existed between them concerning the use of hotel facilities by the Burlington Transportation Company or its employees and passengers. The record also affirmatively shows without dispute that the bus company had no right to control, maintain or care for the rest room in question. Passengers of the bus company were free to enjoy hotel privileges as any others of the public who might care to do

so. Under such circumstances no liability arises as to the bus company. Pickwick Stage Lines v. Edwards, 10 Cir., 64 F.2d 758 . . ."

The only analogous situation is where a passenger on a street railway is injured on a city street when walking to or debarking from a street car. Under some circumstances it has been held that the carrier is liable where a passenger is mistakenly led to alight at an extremely dangerous place which is not a usual stopping place. In *Carroll v. City of Pittsburgh,* 368 Pa. 436, 84 A.2d 505, 507 (1951), the following distinction is noted:

". . . In Perret v. George, 286 Pa. 221, 223, 224, 133 A. 228, 229, it was said by Mr. Justice (later Chief Justice) Kephart in a passage frequently quoted in later cases: 'The hole into which appellant stepped was in the public highway, a thoroughfare over which defendant had no control, was not in any way responsible for, and had no authority to repair, if needed. However broadly and strictly we may have held street railways to care in receiving and discharging passengers, where the company owns or controls the right of way, with the approaches thereto, the rule is different where such right of way and approaches are not so owned. In the latter case there is a permissive use of the street in common with others, without any control of it. The public officers were in authority, and the municipality is responsible for the street's condition, if an injury results therefrom. * * * It is only in exceptional cases, arising under contract, that a street railway company is responsible for acci-

> dents occurring in the cartway of a street through lack of repair."

Concededly the liability imposed upon the owner of a building for injuries suffered by invitees is not based upon title alone but upon possession and control.

In *Rouillard v. Canadian Klondike Club,* 316 Mass. 11, 54 N.E. 2d 680 (1944), a social club which hired a picnic ground was held liable for injuries to a child caused by a defective swing. The child's father had purchased a ticket from the defendant club which entitled her to enter the grounds and to use the equipment.

The Supreme Judicial Court of Massachusetts, upon consideration of an appeal taken by the defendant from an adverse judgment, dismissed the club's contention that it was not liable since it merely had the use of the picnic ground for a day, as being without merit. In doing so the Court made clear the basis for its holding:

> "The jury had before them the testimony of the treasurer of the club that the club paid $40 for which it had the use of the grounds and equipment for the day. Indeed, it was undisputed that the owner had given the club the use of the grounds for the purpose of conducting a picnic and that only those who bought a ticket from the club were to be admitted. The jury were instructed that if the club was not in possession of the grounds and had not acquired the right 'to sell the use of these swings,' then the club was not liable, but that if the club for a consideration

> gave the plaintiff the privilege of using the swings, then it was bound to exercise care to see that the swings were reasonably safe for such use as might ordinarily be made of them. The jury must have understood that the club was not to be held responsible unless it *had possession of the grounds and equipment and that this necessarily included control over the swings . . .*" (54 N.E. 2d at 681) (Italics added).

In the case at bar appellant had no dominion or control or color of right to any control over the Temple or its surroundings. Its patrons were privileged to make use of the premises as were any members of the general public (R. 15). Appellee does not contend that she was misdirected or led into a pitfall or trap (Amended complaint, R. 4). The situation with which appellee was faced was open and apparent. (Plaintiff's Exhibit 1, R. 353, and plaintiff's Exhibit 2, R. 354).

To hold appellant responsible under the facts in the case at bar would be tantamount to making it an insurer of its patrons as to every locality at which they embarked. As an example, if this were the law, a tour company which conducted a tour through the capitals of Europe would be responsible to its patrons for the condition of each and every point of interest visited. If appellant is to be held responsible for a breach of a duty owing to appellee, such a holding would constitute an extension of liability which is not supported by law and is unwarranted and unjustified.

CONCLUSION.

There was no substantial evidence amounting to more than a mere scintilla to support the verdict of the jury against appellant as a matter of law. There was a failure upon the part of appellee to prove the existence of a condition involving unreasonable risk of harm to her person, notice of such condition on the part of appellant or the breach or any duty owing by appellant to appellee. In the interest of justice appellant is entitled to have the judgment of the lower Court reversed and a judgment entered in its favor.

It is urged that the judgment of the District Court be vacated and set aside, and that the District Court be mandated to enter a judgment for appellant, or that in the alternative the District Court be instructed to grant appellant a new trial.

Dated, Honolulu, Hawaii,
August 16, 1958.

Respectfully submitted,
WILLIAM L. FLEMING,
Attorney for Appellant, Tradewind Transportation Company, Limited, (Formerly known as Allen Tours of Hawaii, Ltd.)

Of Counsel:
SMITH, WILD, BEEBE & CADES.

(Appendices I, II and III Follow.)

Appendices.

Appendix I

Filed Aug. 1, 1958 at 1 o'clock and 30 minutes P.M.
Wm. F. Thompson, Jr., Clerk
By /s/ Thos P. Cummins,
Deputy Clerk

In the United States District Court for the District of Hawaii

Civil No. 1535, Honolulu, T. H., July 25, 1958

Paula C. Fraser and Robert A. Fraser,
Plaintiffs,
vs.
Matson Navigation Company, a California corporation,
Defendant.

Before

Hon. J. Frank McLaughlin, Judge.

* * * * * *

The Court. The motion for a new trial is denied. I do not believe that this case could be better tried a second time or that there would be any additional or better presentation of the evidence than we have had

during the trial in question. While I think there may have been errors during the trial of a legal nature, as is characteristic of all trials, for there has yet to be the perfect trial, I do not think that these errors alone warrant the granting of a new trial.

I am, however, going to grant the motion for a judgment notwithstanding the verdict. A motion for a directed verdict having been made not only at the conclusion of the plaintiff's case but at the conclusion of all of the evidence, under the provisions of Rule 50(b) the Court is allowed to make certain legal determinations with respect to questions raised by the motion after the jury's verdict, the same being deemed to be taken under advisement when during the trial it is denied, the case being, under the Rule, regarded as having been submitted to the jury subject to a later determination of these legal questions.

I am mindful in so doing that a jury's verdict is entitled to great weight and respect and to the constitutional provision that no fact determined by a jury may be retried, and I am not, in setting it aside, substituting my judgment for the jury's judgment, but I am setting aside the verdict for reasons purely of law.

I believe during the trial there were legal errors. I am inclined to believe and do believe and do hold that I erred in allowing Mr. Ebert to express an expert opinion on the subject of whether or not these stairs were safe, and thus allowed the province of the jury to be invaded, for whether or not these stairs were safe or involved an unreasonable risk of harm

was ultimately the question to be decided by the jury and was not the subject of expert opinion. As to Dr. Dodge, if his testimony stood alone as the medical testimony in this case, the jury would not have been in point of law warranted in concluding that the plaintiff's injuries were caused by the fall which she suffered in February, 1956, on the premises of the defendant, for he definitely declined to say that he entertained the opinion on the basis of reasonable medical certainty. All that he did and would say was that it could have been caused by such a fall. Possibilities are insufficient as a basis upon which to establish liability for injuries. However, Dr. Dodge's either reluctance or testimonial lack of knowledge on this all-important subject doesn't stand alone, and while I think there is error here, I don't believe that it is too serious or of the reversible variety because of the fact of Dr. Bell's testimony and the documentary testimony of Dr. Gulledge. So suffice it to say that in passing on this point as to Dr. Dodge, I simply concede that there was error as to him and I don't place too much weight on it as a ground for the action which I am taking.

Primarily I am setting the verdict of the jury aside because of insufficient evidence to support the jury's verdict with respect to the plaintiff's duty to establish that there was a failure of duty, a failure to discharge a duty owed to the plaintiff in that there is no evidence warranting the jury's conclusion that the stairs in question were in such a condition at the time in question as to involve an unreasonable risk

of harm. I am further satisfied that there is a failure of proof to establish causal connection, even assuming that there was a failure of duty, failure of proof to prove causal connection of the proximate variety, or more exact language a failure to prove that if there was a failure of the duty to the plaintiff that it was the proximate responsible cause of the plaintiff's injury. There is no question but what the lady was injured as the result of falling on these stairs and that she had suffered greatly and is still suffering, but the mere fact that she fell at the time and place in question does not in and of itself establish liability, and in the absence of proof that the stairs in question involved an unreasonable risk of harm or that, if they did, there was an inadequate warning with respect to the same, cannot provide the basis of liability.

To repeat, primarily for the reason that there was no evidence to support the jury's verdict that the defendant was negligent with respect to the maintenance of these stairs as to invitees, and because, further, if there be such assumed, there was still a failure to establish proximate causation, the verdict must be for this and other reasons recited set aside, and it is so ordered as to both plaintiffs.

ATTEST: A true copy
Wm. F. Thompson, Jr.,
Clerk, United States District Court,
District of Hawaii
By Thos. P. Cummins,
Deputy.

Appendix II

ACT 64, Series A-65, Session Laws of Hawaii, 1947, provides in part as follows:

"Section 3. Powers and Duties of Division. The division of industrial safety shall have the following powers and duties:

(a) It shall inspect places of employment and machines, devices, apparatus and equipment for the purpose of insuring adequate protection to the life and safety of workers.

(b) It shall enforce all rules and regulations made by the commission for the protection of life, health and safety of employees.

(c) It may investigate the cause of all industrial injuries resulting in disability or death which occur in any employment or place of employment, and may make reasonable orders and recommendations with respect to the cause of such injuries.

(d) It may disseminate through exhibitions, moving pictures, lectures, pamphlets and any other method of publicity, information to employers, employees and the general public regarding the causes and prevention of industrial accidents and occupational diseases and related subjects.

(e) Authorized representatives of the division shall have the right to enter any place of employment during regular working hours and at other reasonable times. [L. 1947, c. 64, s. 3.]

Section 4. Safe Place of Employment; Safety Devices and Safeguards. Every employer shall

furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations and processes which are reasonably adequate to render such employment and place of employment safe.

No person shall remove, displace, damage, destroy or interfere with the use of any safety device, safeguard, notice or warning furnished for use in any employment or place of employment.

No employer, owner or lessee of any real property shall construct or cause to be constructed any place of employment that is not safe, and no employer shall occupy or maintain any unsafe place of employment. [L. 1947, c. 64, s. 4.]

Section 5. Safety Orders. Whenever an investigation by the division discloses that any employment or place of employment is not safe, or that any practice, means, method, operation or process employed or used in connection therewith is unsafe or does not afford adequate protection to the life and safety of employees in the employment or place of employment, the director may make an order directing that in the manner and within a time specified such additions, repairs, improvements or changes be made and such safety devices and safeguards be furnished, provided and used as are reasonably required to render the employment or place of employment safe.

The director may, upon application of the employer or any other person affected thereby, grant such extension of time as he finds reasonably necessary for compliance with any order. [L. 1947, c. 64, s. 5.]

Section 6. Prohibition of Use. Whenever in the opinion of an authorized representative of the division the use of any machine, device, apparatus or equipment or any part thereof constitutes an imminent hazard to the life or safety of any person, a notice prohibiting the use thereof shall be attached thereto and a copy delivered to the employer or his agent. The notice shall direct the employer to show cause before the director at a time and place specified therein and not more than five days thereafter why the prohibition should not continue until the use of such machine, device, apparatus or equipment is made safe. Such notice may be disregarded if the division is notified within the time specified that the use of said machine, device, apparatus or equipment has been made safe. After hearing, the director may set aside the prohibition or continue it upon such terms and conditions as he may deem necessary. [L. 1947, c. 64, s. 6.]

Section 7. Judicial Review. An order of the director under sections 5 and 6 shall be final and conclusive against the employer unless the employer, within twenty days after a copy of such order is sent to him, files a petition for review thereof with the circuit judge of the circuit in which he resides or has his principal place of business. The filing of a petition for review shall not of itself stay or suspend the operation of such order, but a stay may be granted by the court upon terms and conditions which it by order directs. The hearing on review shall be de novo and the director shall be deemed a party to any such proceeding. [L. 1947, c. 64, s. 7.]''

Appendix III

Index to Exhibits

I Plaintiff's Exhibits

In evidence:

		Record Pages	
	Identified	Offered	Received
No. 1	87	87	88
No. 2	91	92	92
No. 3	115	115	116
No. 4	115	115	116
No. 5	115	115	116
No. 6	136	136	138
No. 7	148	150	150
No. 8	214	215	217
No. 9	214	215	217

II Defendant Mission's Exhibits

In evidence:

A	267	266	266
B	266	266	266

III Appellant's Exhibits

None